



Arzandeh, A. (2016). Reconsidering the Australian *Forum (Non) Conveniens* Doctrine. *International and Comparative Law Quarterly*, 65(2), 475-491. <https://doi.org/10.1017/S0020589316000014>

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[10.1017/S0020589316000014](https://doi.org/10.1017/S0020589316000014)

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# RECONSIDERING THE AUSTRALIAN *FORUM (NON) CONVENIENS* DOCTRINE

## I. INTRODUCTION

December 2015 marks the 25<sup>th</sup> anniversary of the High Court of Australia's landmark ruling in *Voth v Manildra Flour Mills Pty Ltd.*<sup>1</sup> This judgment, which has been widely regarded as the definitive pronouncement on the application of the *forum (non) conveniens* doctrine in Australia,<sup>2</sup> was significant for two main reasons. First, by a five-to-one majority, it endorsed the 'clearly-inappropriate-forum test' as the basis for the Australian court's approach to discretionary (non-)exercise of jurisdiction.<sup>3</sup> The decision in *Voth*, thereby, addressed some of the uncertainties which had been generated in this area of law, following the High Court's judgment in *Oceanic Sun Line Special Shipping Co Inc v Fay* in 1988.<sup>4</sup>

Second, and more fundamentally, the judgment in *Voth* has been widely regarded as signifying a point of divergence in the Australian court's approach to the *forum (non) conveniens* doctrine from the position in England,<sup>5</sup> following its restatement in 1986 in *Spiliada Maritime Corporation v Cansulex Ltd.*<sup>6</sup> For instance, academic commentators and practitioners have observed that the *Voth* test 'is not the same as that propounded in the *Spiliada* [case]';<sup>7</sup> that it is, in fact, a 'unique approach'<sup>8</sup> which is 'stricter' than the English doctrine,<sup>9</sup> making it harder for a defendant to obtain a stay of proceedings in Australia than in England. The prevailing view is, therefore, that the *Voth* and *Spiliada* tests are *substantively* different.<sup>10</sup>

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<sup>1</sup> (1990) 171 CLR 538. Hereinafter, the phrases 'the *Voth* doctrine' or 'the *Voth* test' are used interchangeably to refer to the Australian *forum (non) conveniens* doctrine, as articulated in the *Voth* case.

<sup>2</sup> In this article, discussions of the application of the Australian *forum (non) conveniens* doctrine refer to disputes where a defendant is seeking to stay proceedings that have been brought against him: (a) during his presence in Australia (the so-called 'as-of-right proceedings'); and, (b) while based outside Australia (the so-called 'service-out' or 'service *ex juris*' cases). Unlike in England, in most instances, a plaintiff need not obtain the Australian court's permission in order to serve proceedings on a foreign-based defendant.

<sup>3</sup> This test had been first conceived of in Deane J's judgment in *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 247-8. In *Voth*, Mason CJ, Deane, Dawson, Gaudron JJ (hereinafter, 'the Joint Justices') and Brennan J recognised and applied the clearly-inappropriate-forum test (though, Brennan J reached a different outcome). Toohey J arrived at the same conclusion as the Joint Justices, but applied the *Spiliada* test.

<sup>4</sup> (1988) 165 CLR 197. For instance, in Australia, Professor Pryles had considered that 'the slim majority and the somewhat diverse reasons put forward by the Court made [the *Oceanic Sun Line* case] an insecure foundation on which to predicate the Australian [*forum (non) conveniens* doctrine]': M Pryles, 'Forum Non Conveniens – the Next Chapter' (1991) 65 Aust LJ 442, 443. Similarly, English law commentators observed that the *Oceanic Sun Line* case 'does not yield a precise result and authoritative statement of the principles which should be applied in Australia in dealing with an application to stay': L Collins, 'The High Court of Australia and forum conveniens: a further comment' (1989) 105 LQR 364, 366.

<sup>5</sup> Indeed, a few other common law jurisdictions, such as New Zealand, Hong Kong and Singapore, have all followed the developments in English law.

<sup>6</sup> [1987] AC 460. In the course of the discussion, the phrases 'the *Spiliada* doctrine' or 'the *Spiliada* test' are used interchangeably to refer to the English *forum (non) conveniens*, as outlined in the *Spiliada* case. The *Spiliada* doctrine provides the basis for the English court's discretionary (non-)exercise of jurisdiction in the context of stays of as-of-right proceedings and also applications for permission to serve proceedings *ex juris*.

<sup>7</sup> Pryles (n 4) 442, 449.

<sup>8</sup> RA Brand and SR Jablonski, *Forum Non Conveniens: History, Global Practice, and Future Under the Hague Convention on Choice of Court Agreements*, (OUP 2007) 90.

<sup>9</sup> P Prince, 'Bhopal, Bougainville and Ok Tedi: Why Australia's *Forum Non Conveniens* Approach is Better' (1998) 47 ICLQ 573, 576 and 597.

<sup>10</sup> See, for instance, L Marasinghe, 'International Litigation: Choice of Forum' (1993) 23 UWA Law Rev 264, 271-3; EL Hayes, 'Forum Non Conveniens in England, Australia and Japan: The Allocation of Jurisdiction in

A quarter of a century on from the High Court's ruling in *Voth*, this article reconsiders the Australian *forum (non) conveniens* doctrine. The discussion is presented in three main parts. Part one outlines briefly the doctrine's origins and development in Australia (II). Part two sets out the orthodox understanding of the modern-day *forum (non) conveniens* doctrine in Australia (III). Part three challenges the prevailing conception of the *Voth* test, based on a detailed analysis of the Australian *forum (non) conveniens* cases, concerning international-private-law (as opposed to interstate) disputes (IV).<sup>11</sup> It argues that the accounts pointing to substantive differences between the *Voth* and *Spiliada* tests are unpersuasive. Accordingly, the article's basic thesis is that any differences between the Australian and English *forum (non) conveniens* doctrines are, in fact, *linguistic* (rather than *substantive*).

## II. *FORUM (NON) CONVENIENS* DOCTRINE IN AUSTRALIA

### A. *The Doctrine's Historical Development*

For much of the twentieth century, the Australian and English courts' approaches to discretionary (non-)exercise of jurisdiction were essentially identical. This similarity was largely due to the (mostly one-way) influence of English cases on the development of this area of law in Australia.<sup>12</sup> For instance, in *Maritime Insurance Ltd v Geelong Harbor Trust Commissioners*,<sup>13</sup> Australian law's (pre-*Voth*) *locus classicus* in the context of staying of proceedings initiated as of right, the High Court embraced the 'vexatious-and-oppressive test', as had been applied in early twentieth-century English cases.<sup>14</sup> This trend continued well into the second half of the twentieth century.<sup>15</sup>

Similarly, English cases shaped the Australian court's approach in service-out cases. Whether the proceedings were served on a defendant based in another Australian state,<sup>16</sup> or

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Transnational Litigation' (1992) 26 UBC Law Rev 41, 52-4; R Garnett, 'Stay of Proceedings in Australia: A "Clearly Inappropriate" Test?' (1999) 23 MULR 30, 36 and 64; G Lindell, 'Choice of Law in Torts and Another Farewell to *Phillips v Eyre* but the *Voth* Test Retained for *Forum Non Conveniens* in Australia' (2002) 3 Melbourne J Int Law 364, 376-8; M Keyes, 'Jurisdiction in International Family Litigation: A Critical Analysis' (2004) 27 UNSW Law Journal 42, 51 (fn 48); A Briggs and P Rees, *Civil Jurisdiction and Judgments*, (5<sup>th</sup> edn, Informa Law 2009) [4.34], 458-60; Lord Collins et al (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15<sup>th</sup> edn, Sweet & Maxwell 2012) r 38(2), [12-011]; R Mortensen et al, *Private International Law in Australia* (2<sup>nd</sup> edn, LexisNexis Butterworths 2011) ch 4; M Davies et al, *Nygh's Conflict of Laws in Australia* (9<sup>th</sup> edn, LexisNexis Butterworths Australia 2014) ch 8; and, A Briggs, *Private International Law in English Courts* (OUP 2014) [4.414]-[4.415], 340-1.

<sup>11</sup> Interstate disputes are those concerning elements from more than one Australian state.

<sup>12</sup> The Australian court relied on the English cases, even though it was not generally bound to do so. Traditionally, courts in Australia were only bound to follow the decisions of the Privy Council, which used to act as their final appellate court. This aspect of the Privy Council's role was gradually confined – following the enactment of the Privy Council (Limitation of Appeals) Act 1968 and Privy Council (Appeals from the High Court) Act 1975 – and, subsequently, completely abolished – after the Australian Act 1986 came into force.

<sup>13</sup> (1908) 6 CLR 194.

<sup>14</sup> Particularly, *Logan v Bank of Scotland (No 2)* [1906] 1 KB 141 and *Egbert v Short* [1907] 2 Ch 205. Subsequently, Scott LJ consolidated the pronouncements in these (and various other) cases into a test in *St Pierre v South American Stones (Gath & Chaves) Ltd* [1936] 1 KB 382. Until the 1970s, the *St Pierre* test was English law's *locus classicus* in the context of staying of as-of-right proceedings.

<sup>15</sup> See, for instance, the Australian court's decisions in cases such as *Cope Allman (Australia) Ltd v Celermajer* [1968] 11 FLR 488 and *Telford Panel and Engineering Works v Elder Smith Goldsborough* (1969) VR 193 (both interstate cases).

<sup>16</sup> See, for instance, *WA Dewhurst & Co Pty Ltd v Cawrse* [1960] VR 278 (service-out proceedings had been commenced in Victoria against a defendant based in South Australia), *Richardson v Tiver* [1960] VR 578 (action brought in Victoria against a Queensland-based defendant) and *Earthworks & Quarries Ltd v FT Eastment & Sons Pty Ltd* [1966] VR 24 (Victorian proceedings had been served *ex juris* on the defendant in New South Wales). Traditionally, the provisions within the Service and Execution of Process Act 1901 (Cth)

another country,<sup>17</sup> Australian counsel (and judges) frequently referred to well-known English authorities,<sup>18</sup> in arguing (and outlining their reasoning) on whether jurisdiction should be asserted in a given case.

In *The Atlantic Star*,<sup>19</sup> in 1973, the English court began gradually to transform its approach to discretionary staying of proceedings, by ‘liberalising’ its conception of the vexatious-and-oppressive test.<sup>20</sup> This significant development in English law did not go unnoticed in Australia; Australian counsel and judges were quick in employing the liberalised test in their submissions and judgments.<sup>21</sup> Indeed, shortly after Lord Diplock’s reformulation of the liberalised vexatious-and-oppressive test in *MacShannon v Rockware Glass Ltd*,<sup>22</sup> courts in Australia appeared, almost as a matter of course, to modify their approach accordingly. Noteworthy in this respect is the 1980 decision in *In the Marriage of Takach (No 2)*.<sup>23</sup> This was a *lis alibi pendens* case,<sup>24</sup> concerning, among other matters, two sets of divorce proceedings in Hong Kong and Australia. In the Australian proceedings, Gibson J applied the *MacShannon* test. He ordered a stay, after concluding, in terms identical to those set out in *MacShannon*, that the Australian court was not the ‘natural forum’ for entertaining the dispute.<sup>25</sup> Similarly, the *MacShannon* test formed the basis for granting stays of proceedings in interstate cases. For instance, in *Garseabo Nominees Pty Ltd v Taub Pty Ltd*,<sup>26</sup> where the defendant had sought to stay the proceedings in New South Wales in favour of the Queensland court, Yeldham J considered that the Australian High Court’s ruling in the *Maritime Insurance* case did not stop him from applying the *MacShannon* test.<sup>27</sup> After a detailed exposition of the various speeches in the *MacShannon* case,<sup>28</sup> Yeldham J granted an order which stayed the proceedings in New South Wales.<sup>29</sup>

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provided the basis for a plaintiff to commence, in one Australian state, an action against a defendant, who was based in another Australian state, by means of service out.

<sup>17</sup> See, for instance, Australian cases such as *Lewis Construction Co Pty Ltd v Tichauer S/A* [1966] VR 341 (action commenced in Victoria against a defendant based in France); *Hayel Saeed Anam & Co v Eastern Sea Freighters Pty Ltd* (1973) 7 SASR 200 (action started in South Australia against Hong Kong-based defendants). Each of Australia’s ten jurisdictions – namely, the High Court, the Federal Court, the Supreme Courts of New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia, the Northern Territory and the Australian Capital Territory – has its own rules based on which service-out proceedings can be initiated.

<sup>18</sup> For instance, *Société Générale De Paris v Dreyfus Brothers* (1888) Ch D 215; *The Hagen* [1908] P 189; *Johnson v Taylor Brothers & Co Ltd* [1920] AC 144; *Rosler v Hilbery* [1925] Ch 250; *In Re Schintz* [1926] Ch 710; and, *The Fehmarn* [1957] 2 Lloyd’s Rep 551.

<sup>19</sup> [1974] AC 436.

<sup>20</sup> *Ibid*, 454 (Lord Reid) and 468 (Lord Wilberforce).

<sup>21</sup> In *Clutha Developments Pty Ltd v Marion Power Shovel Co Inc* [1973] 2 NSWLR 173 (action brought in New South Wales, stay sought in favour of courts in the United States), *Keenco v South Australian and Territory Air Service Ltd* [1974] 23 FLR 155 (proceedings commenced in South Australia, stay sought in favour of the Indonesian court) and *Maple v David Syme & Co Ltd* [1975] 1 NSWLR 97 (an interstate case brought in New South Wales, application was made for a stay to be granted in favour of courts in Victoria), courts in Australia referred to the House of Lords’ ruling in *The Atlantic Star*, in deciding whether to stay their proceedings: P Nygh, ‘Recent developments in Private International Law’ (1974-1975) 6 Aus YIL 172, 172.

<sup>22</sup> [1978] AC 795.

<sup>23</sup> [1980] 47 FLR 441.

<sup>24</sup> These are cases where similar legal proceedings, concerning the same parties, are ongoing in more than one court.

<sup>25</sup> [1980] 47 FLR 441, 447-8.

<sup>26</sup> [1979] 1 NSWLR 663.

<sup>27</sup> *Ibid*, 667.

<sup>28</sup> *Ibid*, 668-70.

<sup>29</sup> See, also, the decisions in *A v B* [1979] 1 NSWLR 57 (a *lis alibi pendens* case, concerning two identical sets of wardship claims which had been brought in New South Wales and Queensland. Applying the *MacShannon* test, the court in New South Wales rejected the mother’s application for a grant of stay of its proceedings) and

In 1986, the transformation of the English court's approach to the practice of discretionary staying of proceedings was completed in the House of Lords' landmark ruling in the *Spiliada* case.<sup>30</sup> Under the *Spiliada* test, as articulated in Lord Goff of Chieveley's speech, to obtain a stay of proceedings, which has been initiated as of right, the defendant has to persuade the English court that there is another foreign court which: (a) is available to decide the dispute; and, (b) is based in a venue with which the dispute has closer connection (than it has with the English court).<sup>31</sup> If these hurdles are overcome, it would then be for the claimant to seek to resist the stay by showing that the foreign court is not more appropriate because the dispute will not be justly disposed of in the more closely connected forum.<sup>32</sup>

### B. The Oceanic Sun Line Case

Given that, for nearly a century, courts in Australia had incorporated, into Australian law, the changes in English approach to discretionary (non-)exercise of jurisdiction, it was reasonable to assume that,<sup>33</sup> when presented with the opportunity, they would do the same in relation to the *Spiliada* test. Indeed, some ten months after the decision in *Spiliada*, that opportunity presented itself to the High Court of Australia in *Oceanic Sun Line Special Shipping Co Inc v Fay*.<sup>34</sup> Rather surprisingly, though, in a three-to-two majority ruling,<sup>35</sup> the High Court refused to adopt the *Spiliada* doctrine.

The facts of the case (and legal issues arising therefrom) are well known and widely discussed in the existing literature.<sup>36</sup> For our purposes, therefore, it is only necessary to revisit the majority Justices' rationale for resisting the adoption of the *Spiliada* doctrine. The majority Justices' stance, in opposition to *Spiliada*, was premised on two main considerations. First, they regarded that the scope for the court's discretion under the more-appropriate-forum test was unduly broad and would lead to unpredictable outcomes.<sup>37</sup> Second, the majority regarded the *Spiliada* test to be out of step with earlier Australian authorities – specifically, the *Maritime Insurance* case. Hence, they were unwilling to adopt it.<sup>38</sup>

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*Ranger Uranium Mines Pty v BTR Trading (Q) Pty Ltd* [1985] 75 FLR 422 (where, relying on the *MacShannon* test, the defendant sought to stay proceedings in the Northern Territory Supreme Court, pointing to New South Wales as the venue in which the action should be heard).

<sup>30</sup> For a more detailed exposition of the doctrine's application, see *Dicey, Morris & Collins* (n 10) r 38(2), [12–029]–[12–046], 551–65; and, Briggs & Rees (n 10) [4.13], 424–6.

<sup>31</sup> *Spiliada* (n 6) 476. In service-out cases, the burden of proof shifts onto the claimant.

<sup>32</sup> *Ibid* 478. The *Spiliada* test is also known in the literature as the 'more-appropriate-forum test'.

<sup>33</sup> There was certainly no indication to the contrary in the Australian commentary at the time: P Nygh, *Conflict of Laws in Australia*, (4<sup>th</sup> edn, Butterworths 1984), 63–4.

<sup>34</sup> (1988) 165 CLR 197.

<sup>35</sup> Brennan, Deane and Gaudron JJ; Wilson and Toohey JJ dissenting.

<sup>36</sup> See, mainly, M Pryles, 'Judicial Darkness on the Oceanic Sun' (1988) 62 ALJ 774; A Beech, 'Discretion in The Exercise of Jurisdiction: Recent Developments' (1989) 19 UWA Law Rev 8 at 8–15; FMB Reynolds, 'Forum non conveniens in Australia' (1989) 105 LQR 40; A Briggs, 'Wider still and wider: the bounds of Australian exorbitant jurisdiction' [1989] LMCLQ 216; and, M Garner, 'Towards an Australian Doctrine of *Forum Non Conveniens*' (1989) 38 ICLQ 361.

<sup>37</sup> For example, Brennan J observed that 'the English law [had] moved from a discretion confined by a tolerably precise principle [under the *St Pierre* test] to a broad discretion [under *Spiliada*]: 238. Similarly, Deane J deemed undesirable the post-*Spiliada* expansion in the scope of the court's discretion to stay its proceedings: 254. Gaudron J also alluded to broadly similar concerns: 265.

<sup>38</sup> (n 34) 253 (Deane J). Brennan J also observed that 'the function which the courts of [Australia] would be required to perform if the new English approach were adopted would ... be inconsistent with what we have hitherto understood to be the function and duty of the courts': 238. Gaudron J shared the same opinion, stating that any changes or modifications of the law should be limited to those instances where the rights and liabilities of parties to the litigation are 'by reason of applicable choice of law rules, be determined by the application of

While united in their rejection of the *Spiliada* doctrine, the majority Justices were divided on the doctrinal framework for the court's application of the *forum (non) conveniens* doctrine in Australia. Brennan J favoured an approach which afforded the court a narrow scope for exercising its discretion.<sup>39</sup> As such, he considered that the vexatious-and-oppressive test, as outlined in the *Maritime Insurance* case, should continue to provide the basis for the court's discretionary (non-)exercise of jurisdiction.<sup>40</sup> Deane and Gaudron JJ, however, preferred a *forum (non) conveniens* doctrine which gave the court more room for manoeuvre. Accordingly, Deane J, who had the support of Gaudron J,<sup>41</sup> proposed that, in the context of as-of-right proceedings, the court has discretion to stay its proceedings if it is persuaded that, 'having regard to the circumstances of the particular case and the availability of the foreign tribunal, [the Australian court] is a clearly inappropriate forum for the determination of the dispute between the parties'.<sup>42</sup>

Deane and Gaudron JJ were adamant in distinguishing between their approach and the one under the *Spiliada* test. They emphasised that, under the clearly-inappropriate-forum test, the court was concerned with establishing *its own* (in)appropriateness to entertain the dispute. Under the *Spiliada* test, though, the question is whether the available *foreign forum* is (in)appropriate. Therefore, Deane and Gaudron JJ stated that, under their test, 'the mere fact that a tribunal in some other country would be a more appropriate forum for the particular proceeding [did] not necessarily mean that the local court [was] a clearly inappropriate one'.<sup>43</sup>

The High Court's decision in the *Oceanic Sun Line* case was criticised on at least three grounds. First, it was considered that, the High Court had applied the wrong test to the facts of the case. *Oceanic Sun Line* was a service-out case. However, virtually all the submissions and reasoning in the case concerned the court's discretionary (non-)exercise of jurisdiction as though the case had been commenced as of right. Consequently, the critics have argued that the decision in the *Oceanic Sun Line* case broke with long-standing precedent and, thereby, made it more difficult for a defendant to resist the court's jurisdiction in a service-out case.<sup>44</sup> Second, the majority Justices' opposition to *Spiliada* was criticised as it rendered the Australian approach to discretionary (non-)exercise of jurisdiction out of step with the doctrine in the United States and England.<sup>45</sup> Finally, and arguably more significantly, the division in the majority Justices' pronouncements, on the application of the *forum (non) conveniens* doctrine, created doctrinal incoherence in this aspect of Australian law.

### C. The Decision in Voth

Under three years after its ruling in the *Oceanic Sun Line* case, the Australian High Court was presented with an opportunity, in the *Voth* case, to respond to these criticisms. As the facts of

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the substantive law of a foreign legal system, the forum law merely providing the procedural framework for the action': 265.

<sup>39</sup> *Oceanic Sun Line* (n 34) 238-9.

<sup>40</sup> *Ibid* 241.

<sup>41</sup> *Ibid* 266.

<sup>42</sup> *Ibid* 248.

<sup>43</sup> *Ibid* 248 (Deane J) and 266 (Gaudron J).

<sup>44</sup> See, especially, A Briggs, 'Forum non conveniens in Australia' (1989) 105 LQR 200, 200; L Collins (n 4) 364, 364-5; and, Briggs (n 36) 216, 221-2.

<sup>45</sup> Pryles (n 36) 774, 784-5.

*Voth* have been widely considered in the existing academic commentary,<sup>46</sup> the discussion in this section only focuses on the High Court's pronouncements on the application of the *forum (non) conveniens* doctrine.

The court acknowledged that the divergences in the judgments in the *Oceanic Sun Line* case had led to confusion in the understanding of the Australian court's approach to discretionary (non-)exercise of jurisdiction.<sup>47</sup> In response to this problem, and in order to arrive at a more settled and authoritative position, all but one of the Justices endorsed the clearly-inappropriate-forum test as the basis for applying the *forum (non) conveniens* doctrine.<sup>48</sup> Consequently, the traditional vexatious-and-oppressive test was formally abandoned.

What is more, the High Court reiterated its earlier opposition to the adoption of the *Spiliada* test in Australia. The Joint Justices were critical of the *Spiliada* test because, in their view, it allowed the English court to engage in the assessment of the (un)suitability of a foreign court.<sup>49</sup> Instead, they regarded the clearly-inappropriate-forum test to be much more defensible as it concentrated on the determination of the (in)appropriateness of the local forum, by an Australian judge, who is best placed to make such a pronouncement.<sup>50</sup> The Joint Justices restated the potential differences between the English and Australian *forum (non) conveniens* doctrines, as identified in Deane and Gaudron JJ's judgments in the *Oceanic Sun Line* case.<sup>51</sup> Accordingly, they observed that, regardless of the availability of another foreign forum with closer connection to the dispute( than the local forum), the *Voth* test enables the Australian court to sustain its proceedings if it is not a clearly inappropriate forum.<sup>52</sup>

Nevertheless, the Joint Justices adopted a much more emollient tone when discussing the *Spiliada* test.<sup>53</sup> In the *Oceanic Sun Line* ruling, when outlining the clearly-inappropriate-forum test, Deane and Gaudron JJ had drawn no support from the *Spiliada* doctrine. In *Voth*, though, the Joint Justices stated that the factors at the heart of the application of *Spiliada*'s two-limb test, as outlined in Lord Goff's speech, provided 'valuable assistance' for the exercise of the clearly-inappropriate-forum test.<sup>54</sup> Indeed, they relied on those very considerations in finding that, on the facts in *Voth*, Australia was a clearly inappropriate forum for resolution of the dispute. The Joint Justices considered that there was little difference between the approaches in the *Voth* and *Spiliada* tests and that they were 'likely to yield the same result ... in the majority of cases'.<sup>55</sup> Furthermore, and similar to the position under English law, the Joint Justices made it plain that the clearly-inappropriate-forum test provided the basis for the application of the court's discretion in service-out cases. In these cases, the onus would remain on the plaintiff to show that the Australian forum is not clearly inappropriate.<sup>56</sup>

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<sup>46</sup> For a detailed discussion of the case, see L Collins, 'The High Court of Australia and *forum conveniens*: the last word?' (1991) 107 LQR 182; Pryles (n 4); P Brereton, 'Forum Non Conveniens in Australia: A Case Note on *Voth v Manildra Flour Mills*' (1991) 40 ICLQ 895; and, Garnett (n 10) 30, 33-6.

<sup>47</sup> *Voth* (n 1) 552 (Joint Justices – namely, Mason CJ, Deane, Dawson, Gaudron JJ) and 572 (Brennan J).

<sup>48</sup> Toohey J maintained his stance in the *Oceanic Sun Line* and applied the *Spiliada* test to the facts of the case.

<sup>49</sup> *Voth* (n 1) 558-9.

<sup>50</sup> *Ibid* 560.

<sup>51</sup> *Ibid* 558-62.

<sup>52</sup> *Ibid* 559.

<sup>53</sup> They even went as far as stating that 'From an abstract (and international) standpoint there [was] much to be said for the [*Spiliada*] test.': *Voth* (n 1) 559.

<sup>54</sup> *Voth* (n 1) 566.

<sup>55</sup> *Ibid* 559.

<sup>56</sup> *Ibid* 565. See, also, Mortensen (n 10) [2.42], 54-6. In cases which have been commenced in Australia as of right, the burden shifts onto the defendant to convince the court that it is clearly inappropriate to hear the case.

### III. THE ORTHODOX UNDERSTANDING OF THE MODERN-DAY AUSTRALIAN *FORUM (NON) CONVENIENS* DOCTRINE

Notwithstanding these observations, and the High Court's more conciliatory tone towards *Spiliada*, the orthodox understanding of the modern-day *forum (non) conveniens* doctrine in Australia is that the English and Australian approaches to discretionary (non-)exercise of jurisdiction are *substantively* different. This conception does not appear to be advanced based on a clear *body of precedent*. Rather, it has been articulated almost entirely based on a literal reading of the Joint Justices' *dicta* in *Voth*.<sup>57</sup> Consequently, English and Australian *forum (non) conveniens* doctrines are deemed to be substantively different because, when applying the clearly-inappropriate-forum test, the Australian court is assessing *its* (un)suitability as opposed to that of another *foreign* forum – which is what the *Spiliada* test is concerned with. Moreover, the conventional understanding has been reinforced following the Australian High Court's refusal to replace *Voth* with the *Spiliada* test on at least two occasions, in the recent past – namely, in *Regie Nationale des Usines Renault SA v Zhang*<sup>58</sup> and *Puttick v Tenon Ltd.*<sup>59</sup>

According to the prevailing view, as reflected in the Australian legal literature, it is more difficult to obtain a stay of proceedings in Australia than is the case under the *Spiliada* doctrine in England. For instance, the editors of *Private International Law in Australia* have advanced the view that the *Voth* test is 'a narrower one than that of *Spiliada*',<sup>60</sup> and 'has not provided defendants much opportunity to have proceedings in Australia restrained'.<sup>61</sup> Professor Keyes has also pointed to the doctrinal divergence between *Voth* and *Spiliada*, observing that, while *Voth* is a 'heavily forum-centric' doctrine, the *Spiliada* test is more outward looking and, hence, 'more likely to lead to fair results in international disputes'.<sup>62</sup>

A similar view, confirming the doctrinal difference in the application of the *forum (non) conveniens* doctrine in England and Australia, is also prevalent across the common law world. In England, for instance, the editors of *Dicey, Morris and Collins* have observed that the discretion afforded to the court under the *Voth* test is of 'a much more restricted form' than the one under the *Spiliada* doctrine and 'continues to invoke the notions of vexation and oppression'.<sup>63</sup> Similarly, the editors of *Civil Jurisdiction and Judgments* have stated that the differences in the application of the doctrines in England and Australia are greater in practice than had been predicted in *Voth*.<sup>64</sup> In Canada, also, it has been suggested that it is more onerous for a defendant to obtain a stay under the *Voth* test than under *Spiliada* because 'it may be that very tenuous connections with Australia will be sufficient to justify a finding that the Australian court is not "clearly inappropriate"'.<sup>65</sup>

Given the *Voth* test's perceived plaintiff-friendly nature, in as-of-right proceedings, it has been considered that the doctrinal gap between the English and Australian *forum (non) conveniens* doctrines is even wider in the context of service-out cases. For instance, the editors of *Civil Jurisdiction and Judgments* have argued that, notwithstanding the similarity in the way in which the English and Australian courts apply the tests, in service-out cases

<sup>57</sup> See, for instance, Lindell (n 10) 364, 378.

<sup>58</sup> (2002) 210 CLR 491.

<sup>59</sup> (2008) 238 CLR 265.

<sup>60</sup> Mortensen (n 10) [4.21], 106.

<sup>61</sup> *Ibid* [4.22], 107.

<sup>62</sup> Keyes (n 10) 42, 63 (citations omitted). Similar views have also been expressed, *inter alia*, in Pryles (n 4); Marasinghe (n 10); Prince (n 9); and, Lindell (n 10).

<sup>63</sup> *Dicey, Morris & Collins* (n 10) r 38(2), [12–011], 540.

<sup>64</sup> Briggs & Rees (n 10) [4.34], 458–9. See, more recently, Briggs (n 10) [4.414]–[4.415], 340–1.

<sup>65</sup> Hayes (n 10) 41, 54. See, also, Brand & Jablonski (n 8) 87, 100 and 102.



‘what the claimant has to show is so limited, it is much less demanding’ than what a claimant has to do in the same context in England.<sup>66</sup> Likewise, Mr Brereton SC has stated that ‘arguably the test in *Voth* will too readily lead to the exercising of jurisdiction over non-residents’.<sup>67</sup> In this regard, the principles on which proceedings can be commenced against a foreign-based defendant have been considered to be more favourable for plaintiffs in Australia than anywhere else which recognises service-out jurisdiction.<sup>68</sup>

Against this backdrop, the advocates of the conventional view have often used instances where the Australian court has chosen, in the face of a *forum (non) conveniens* application, to assert jurisdiction over a private-international-law dispute as evidence in support of their construction of the *Voth* test. In this respect, the decision in *Zhang* is a useful example. In this case, the plaintiff, an Australian resident, suffered serious personal injuries while driving a hired car, which had been manufactured by the defendant French company, during his visit to New Caledonia, a French colony in the Pacific Ocean. He argued that his injuries had been caused by negligence on the defendant’s part. One of the main questions for consideration was whether the Australian court should stay its proceedings (which had been brought *ex juris*) under the *forum (non) conveniens* doctrine. By a five-to-two majority decision,<sup>69</sup> the High Court ruled that the Australian proceedings should be sustained. Although some (though not all) of the factors in the case – such as the *lex causae* and some of the witnesses – pointed to France, the court concluded that Australia was not a clearly inappropriate forum and, as such, chose to sustain the Australian proceedings. Commenting on the case, in its immediate aftermath, Professor Lindell regarded the decision in *Zhang* as illustrative of the substantive differences between the Australian and English approaches to the application of the *forum (non) conveniens* doctrine.<sup>70</sup> Similarly, in a casenote in the *Law Quarterly Review*, Professor Smart stated that ‘*Zhang* confirms that extended jurisdiction may be exercised by the Australian courts despite the fact that the dispute has a closer connection to a foreign forum’.<sup>71</sup>

The persuasiveness of the widely-held understanding of the *Voth* test depends on whether there is a *body of precedent* – rather than a number of disparate, individual cases – which clearly evidences that it is more difficult for defendants to convince the Australian court to give up its jurisdiction, whether in as-of-right or service-out cases,<sup>72</sup> under the *Voth* test than it is the case under *Spiliada*. The discussion in the next section seeks to address this issue.

#### IV. ARE THE ENGLISH AND AUSTRALIAN APPROACHES TO *FORUM (NON) CONVENIENS* SUBSTANTIVELY DIFFERENT?

There are different analytical approaches which can be resorted to in assessing whether the *Voth* test is, in fact, a narrower and stricter test than *Spiliada*. One seemingly obvious approach is to quantify the number of instances in which the Australian and English courts have decided not to assume jurisdiction over a dispute.<sup>73</sup> Such an exercise would be

<sup>66</sup> Briggs & Rees (n 10) [4.82], 531-2.

<sup>67</sup> Brereton (n 46) 895, 900. See, also, Hayes (n 10) 41, 52.

<sup>68</sup> Collins (n 46) 182, 187.

<sup>69</sup> Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ; Kirby and Callinan JJ dissenting.

<sup>70</sup> Lindell (n 10) 364, 381.

<sup>71</sup> PStJ Smart, ‘Foreign torts and the High Court of Australia’ (2002) 118 LQR 512, 515.

<sup>72</sup> With the exception of Northern Territory and Western Australia, the Australian court’s permission to serve proceedings *ex juris* is not required.

<sup>73</sup> See, for instance, M Keyes, *Jurisdiction in International Litigation* (Federation Press 2005) ch 5. Among other things, Professor Keyes considers the application of the *forum (non) conveniens* doctrine in Australia. Her

illuminating as it would provide a general sense of the ease (or difficulty) with which stays of proceedings are obtained in both jurisdictions. However, it is questionable whether a comparison between the proportion of cases in Australia and England where the courts have chosen not to exercise jurisdiction is as useful an indicator of the doctrinal differences between the *Voth* and *Spiliada* tests as it may first appear. After all, a practice of this nature can only help to establish a clear picture of the respective narrowness (or breadth) of *Voth* and *Spiliada* if the tests are applied to exactly the same set of facts and legal issues.

Another approach, which might be deemed to be appropriate, is to identify analogous *forum (non) conveniens* cases in Australia and England and assess whether the application of the *Voth* and *Spiliada* tests in these cases has led to (dis)similar results.<sup>74</sup> At first blush, this approach seems to be attractive in demonstrating the substantive differences (if any) in the application of those doctrines. For reasons that follow, though, it is not terribly helpful. Under both doctrines, the decision whether to exercise jurisdiction hinges on the facts of the case. It is, therefore, not at all unusual for a court, which applies the *same forum (non) conveniens* doctrine to analogous cases *within* its jurisdiction, to come to different conclusions on the question of sustaining (or staying) its proceedings. For example, in applying the *Spiliada* test to four recent cases in England, which concerned broadly similar factual and legal issues, the English court arrived at different rulings.<sup>75</sup> In these circumstances, an exercise which compares the differences in the way in which the Australian and English courts have applied their *forum (non) conveniens* doctrines in dealing with analogous cases is, ultimately, unlikely to be of much assistance.

It is argued that a much more prudent course of action would be to employ an analytical approach which highlights, in a fact-neutral manner, any substantive (dis)similarities in the application of the *Voth* and *Spiliada* doctrines. Based on this approach, the Australian *forum (non) conveniens* case law should be analysed from three perspectives. The first one is specific in focus: it seeks to identify the factors at the heart of the operation of the *Voth* test and examine the Australian court's application of them. The second, which is rather more general in emphasis, intends to map out the Australian court's broader methodological framework for reasoning in *forum (non) conveniens* cases. The third builds on the other two. It engages in a comparative examination of the wider implications arising from the application of the *Voth* and *Spiliada* tests and, thereby, seeks further to complete the understanding of any substantive (dis)similarities between these tests. These analyses will serve to highlight the extent to which (if at all) the *Voth* and *Spiliada* doctrines are, in fact, substantively dissimilar.

#### A. The Factors Considered Under *Voth*

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work quantifies all the instances in which the Australian superior courts (including the Family Court of Australia) applied the *forum (non) conveniens* doctrine between 1991 and 2001. The sample of cases covered in the book are inclusive of where application for stays related to proceedings brought in breach of Australian (or foreign) jurisdiction clauses – which, of course, fall outside the scope of a *forum (non) conveniens* case as understood under English law.

<sup>74</sup> For an analysis of the *Voth* test, premised broadly within this framework, see Garnett (n 10) 30, 39-46.

<sup>75</sup> *Cherney v Deripaska* [2008] EWHC 1530 (Comm); [2009] 1 All ER (Comm) 333, affirmed by the Court of Appeal [2009] EWCA Civ 849 (English jurisdiction was exercised); [2009] 2 CLC 408; *OJSC Oil Company Yugraneft (in liquidation) v Abramovich* [2008] EWHC 2613 (Comm) (English jurisdiction was relinquished); *Pacific International Sports Clubs Ltd v Soccer Marketing International Ltd* [2009] EWHC 1839 (Ch), affirmed by the Court of Appeal [2010] EWCA Civ 753 (English jurisdiction was relinquished); and, *Altimo Holdings and Investment Ltd v Kyrgyz Mobil Tel Ltd* [2011] UKPC 7; [2012] 1 WLR 1804 (English jurisdiction was exercised). For a discussion of these cases, and criticisms of the *Spiliada* doctrine's unpredictable nature, as highlighted in these cases, see A Arzandeh, 'Should the *Spiliada* Test Be Revised?' (2014) 10 JPrivIL 89, 94-6.

As stated earlier, in *Voth*, the Joint Justices observed that the factors referred to when applying the *Spiliada* test were of ‘valuable assistance’ in the exercise of the discretionary power under the clearly-inappropriate-forum test. Indeed, as evidenced in *Nygh’s Conflict of Laws in Australia*, the application of the *Voth* test is premised on identical considerations to those at the heart of *Spiliada*’s operation.<sup>76</sup> When asked to give up its jurisdiction, whether in as-of-right or service-out cases, the Australian court enquires, *inter alia*, into the availability of the foreign forum, the dispute’s governing law, the existence of foreign parallel proceedings and the location of witnesses and evidence. The assessment of how these factors are applied in Australia could illustrate whether the *Voth* test is, in fact, as inward looking and plaintiff-friendly as it is widely claimed to be.

An evaluation of the post-*Voth* *forum (non) conveniens* cases in Australia indicates that, not only does the Australian court employ the same factors as those which determine *Spiliada*’s application, but it has also, for the most part, conceived of them in effectively the same way. Consider, for instance, the treatment of the law applicable to the dispute under the *Voth* and *Spiliada* tests. Under the *Voth* doctrine, the dispute’s applicable law is one of a number of elements which, in the circumstances, can play an important part in the Australian court’s decision on whether to sustain its proceedings.<sup>77</sup> The fact that a foreign law governs the dispute does not, *ipso facto*, render the Australian court a clearly inappropriate forum.<sup>78</sup> Nevertheless, as the decisions in *Seereederei Baco Liner GmbH v Al Aliyu*<sup>79</sup> and *El-Kharouf v El-Kharouf*<sup>80</sup> illustrate, the Australian court does not hesitate from ordering a stay of its proceedings where it has found the foreign *lex causae* to be difficult to prove.

Notwithstanding the perception in Australia that the *Spiliada* test ‘tends to push litigation back to the same place whose law will govern the outcome of the dispute’,<sup>81</sup> the *lex causae* is ascribed the same significance in the stay-of-proceedings analysis under the English doctrine. The following passage in *Dicey, Morris and Collins* provides a helpful distillation of the treatment of the *lex causae* under the *Spiliada* test:

if the legal issues [at the heart of the dispute] are straightforward, or if the competing fora have domestic laws which are substantially similar, the identity of the governing law will be of rather little significance. But if the legal issues are complex, or the legal systems very different, the general principle that a court applies its own law more readily than does a foreign court will help to point to the more appropriate forum, whether English or foreign.<sup>82</sup>

Accordingly, similar to the position in *Voth*, under the *Spiliada* test, an Arcadian governing law may only lead to the finding that Arcadia is more appropriate to entertain the case if ‘issues of law are likely to be important and if there is evidence of relevant differences in the

<sup>76</sup> *Nygh’s Conflict of Laws in Australia* (n 10) [8.26]-[8.56], 197-213. See, also, Brand & Jablonski (n 8) 104.

<sup>77</sup> *Nygh’s Conflict of Laws in Australia* (n 10) [8.38]-[8.43], 203-7, outlining, *inter alia*, remarks in the Australian court’s decisions in the *Voth* case (n 1) 566, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 521, *El-Kharouf v El-Kharouf* [2004] NSWSC 187, [23] and *Fleming v Marshall* (2011) 279 ALR 737, [104].

<sup>78</sup> See, for instance, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Zhang* (n 58) 521.

<sup>79</sup> [2000] FCA 656 (a case concerning a dispute governed by Guinean law in which the Australian court decided not to exercise jurisdiction), referred to in *Nygh’s Conflict of Laws in Australia* (n 10) [8.39], 204.

<sup>80</sup> (n 77) (where the Australian court stayed its proceedings in a case involving a Jordanian choice-of-law clause), referred to in *Nygh’s Conflict of Laws in Australia* (n 10) [8.39], 204.

<sup>81</sup> A Bell, ‘Symposium Paper: The Future of Private International Law in Australia’ (2012) 19 Aust ILJ 11, 14 (available at <http://www.austlii.edu.au/au/journals/AUIntLawJl/2012/2.pdf>, accessed on 30 March 2015).

<sup>82</sup> *Dicey, Morris & Collins* (n 10) r 38(2), [12-034], 556 (citations omitted). See, also, Briggs & Rees (n 10) [4.22], 435-7.

legal principles or rules applicable to such issues' in England and Arcadia.<sup>83</sup> Otherwise, little weight would be given to the choice of Arcadian law.

There are also similarities in the English and Australian courts' treatment of pending parallel (or related) proceedings in a foreign forum. Under the *Voth* and *Spiliada* doctrines, the existence of these proceedings is an important (though not dispositive) factor in the courts' decision regarding the exercise of its jurisdiction.<sup>84</sup> As such, in these cases, the consideration of a broad range of factors enables the English and Australian courts to decide whether to stay or sustain their proceedings. Among other things, the courts look into the costs incurred by the parties in the foreign proceedings and the stage which those proceedings have reached. There is, *prima facie*, more likelihood of obtaining a stay, under *Voth* or *Spiliada*, if the foreign proceedings are at an advanced stage and the parties have incurred considerable costs in the process.<sup>85</sup> Additionally, the English and Australian courts are more likely to grant a stay of their proceedings if there is a stronger connection between the dispute and the foreign forum in which the parallel (or related) proceedings are ongoing. It was, in part, for this reason that the English and Australian courts decided not to exercise jurisdiction in *The Abidin Daver*<sup>86</sup> and in *Navarro v Jurado*,<sup>87</sup> respectively. Finally, the application of both *Voth*<sup>88</sup> and *Spiliada*<sup>89</sup> has highlighted that, in a *lis alibi pendens* case, there would be a weaker prospect of obtaining a stay if the foreign court is unlikely to assume jurisdiction over the dispute. In summary, and like the position regarding the dispute's applicable law, the case law on the treatment of *lis alibi pendens* cases signifies very little difference in approach in England and Australia.

These similarities in approach are also detectable in the way in which the Australian and English courts take into account availability of witnesses and other evidence, when applying the *Voth* and *Spiliada* tests.<sup>90</sup> For instance, in *PCH Offshore v Dunn (No 2)*,<sup>91</sup> the Australian court decided not to exercise jurisdiction over the dispute as the majority of the

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<sup>83</sup> Lord Mance JSC in *VTB Capital plc v Nutritek International Corp* [2013] UKSC 5; [2013] 2 AC 337, 368. There are a number of English cases which highlight that the choice of law is not necessarily the decisive factor in the application of *Spiliada*: see, for instance, *Macsteel Commercial Holdings (Pty) Ltd & Anor v Thermasteel V (Canada) Inc* [1996] CLC 1403 (*lex causae*: English law; more appropriate forum: Ontario); *Navigators Insurance Co v Atlantic Methanol Production Co LLC* [2003] EWHC 1706 (Comm) (service-out case; *lex causae*: English law; more appropriate forum: Texas); *Mujur Bakat Sdn Bhd v Uni Asia General Insurance Bhd* [2011] EWHC 643 (Comm) (service-out case; *lex causae*: English law; more appropriate forum: Malaysia); and, the *VTB Capital* case itself (service-out case; *lex causae*: English law; more appropriate forum: Russia).

<sup>84</sup> In Australia, see, *inter alia*, Dawson, Gaudron, McHugh and Gummow JJ in *Henry v Henry* (1996) 185 CLR 571, 591 (where the Australian proceedings were stayed in favour of the ongoing proceedings in Monaco) and Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ in *CSR Ltd v Cigna Insurance Ltd* (1997) 189 CLR 345, 395 (where the Australian court was held to be a clearly inappropriate forum in a case involving parallel proceedings in New Jersey), further discussed in *Nygh's Conflict of Laws in Australia* (n 10) [8.45]-[8.26], 207-8. As for the position in England, see especially Lord Diplock's speech in *The Abidin Daver* [1984] AC 398, 409-10 and also the commentary in *Dicey, Morris & Collins* (n 10) r 38(2), [12-043], 563.

<sup>85</sup> *Henry* (n 84) 580. In England, see Lord Goff in *de Dampierre v de Dampierre* [1988] AC 92, 108 and Hirst J in *Cleveland Museum of Art v Capricorn Art International SA* [1990] 2 Lloyd's Rep 166, 173.

<sup>86</sup> (n 84) 409-10 (parallel proceedings were ongoing in Turkey). Although decided almost three years before *Spiliada*, *The Abidin Daver* provides a useful example for the application of the *Spiliada* doctrine in relation to *lis alibi pendens* cases.

<sup>87</sup> [2010] 247 FLR 374 (a case concerning *lis alibi pendens* in Costa Rica). See, also, the discussion in *Henry* (n 84) 592-3.

<sup>88</sup> See, *Henry* (n 84) 590.

<sup>89</sup> See, *inter alia*, *The Volvox Hollandia* [1988] 2 Lloyd's Rep 361.

<sup>90</sup> More generally, see the similarity in the Australian and English courts' approaches to the issue of location of witnesses and evidence, as highlighted in *Nygh's Conflict of Laws in Australia* (n 10) [8.54]-[8.56], 212-3 and *Briggs & Rees* (n 10) [4.20]-[4.21], 434-5.

<sup>91</sup> [2010] FCA 897 (a service-out case).

witnesses and evidence in the case were based in Azerbaijan. Likewise, in *Limit (No 3) Ltd v PDV Insurance Co Ltd*, the English court refused to assume jurisdiction over the defendant company, which was based in Venezuela, *inter alia*, on the basis that the dispute had a strong connection with Venezuela.<sup>92</sup>

Perhaps the only context in which there is some difference between the weight attributed to the relevant factors is in relation to the way in which the availability of an alternative foreign forum is defined under the *Spiliada* and *Voth* doctrines. The availability of the foreign forum is one of the key elements within *Spiliada*'s first limb.<sup>93</sup> Availability, in this context, is narrowly defined: the alternative foreign forum is available if it would assume jurisdiction over the dispute.<sup>94</sup> Under the *Voth* test, though, availability appears to have a broader scope and could include situations in which the plaintiff's claim has become time-barred in the alternative foreign forum.<sup>95</sup> Furthermore, over the years, there have been a handful of Australian cases in which judges have made passing remarks, suggesting that the Australian court could stay its proceedings regardless of the availability of another foreign forum to entertain the dispute.<sup>96</sup> Notwithstanding these pronouncements, and the wider scope ascribed to availability in Australia, it is impossible to identify a reported case in which the Australian court has found itself to be a clearly inappropriate forum, even though no other foreign forum is available to entertain the dispute. Indeed, in her extensive analysis of staying of proceedings in Australia between 1991 and 2001, Professor Keyes found that the Australian court chose to sustain its proceedings where another available foreign forum could not be identified.<sup>97</sup> In practice, therefore, the English and Australian courts have tended to adopt a similar conception of the availability of the foreign forum. In both jurisdictions, the courts' (non-)exercise of jurisdiction depends, in part, on the existence of another foreign forum which would entertain the dispute.<sup>98</sup>

The discussion in this sub-section has highlighted that there are substantive *similarities* between the English and Australian courts' practice of discretionary (non-)exercise of jurisdiction. In applying the *Spiliada* and *Voth* tests, the courts consult effectively the same factors. What is more, they generally ascribe the same weight to these factors. In other words, the courts follow virtually an identical set of analysis in deciding whether to assume jurisdiction over a dispute. Consequently, *ceteris paribus*, the English and Australian courts tend to sustain (or relinquish) their proceedings in similar instances.

#### *B. The Australian Court's Broader Methodological Framework for Reasoning Under Voth*

Be that as it may, it might be argued that there are other considerations which render the two doctrines different. Indeed, in *Voth*, the Joint Justices pointed to one such distinguishing factor which they regarded to be of significance. According to the Joint Justices, under the *Spiliada* doctrine, the English court exercises its discretion whether to stay (or sustain) its

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<sup>92</sup> [2003] EWHC 2632 (Comm), affirmed by the Court of Appeal [2005] EWCA Civ 383; [2005] 1 CLC 515.

<sup>93</sup> *Spiliada* (n 6) 476. *Dicey, Morris & Collins* (n 10) r 38(2), [12–032], 554.

<sup>94</sup> See *Connelly v RTZ Corporation* [1998] AC 854. Prior to this ruling, there had been some confusion in English law as to whether the availability of the more appropriate foreign forum depended on whether it could justly dispose of the dispute in hand: *Mohammed v Bank of Kuwait and the Middle East KSC* [1996] 1 WLR 1483. For criticisms of this decision, see A Briggs, 'Forum non conveniens and unavailable courts' (1996) 67 BYIL 587.

<sup>95</sup> See, for instance, *Fleming v Marshall* (n 77).

<sup>96</sup> See, for instance, Campbell JA in *Garsec Pty Ltd v His Majesty the Sultan of Brunei* [2008] NSWCA 211, [141], discussed in Nygh's *Conflict of Laws in Australia* (n 10) [8.33]–[8.35], 201–2.

<sup>97</sup> Keyes (n 73) 173.

<sup>98</sup> See, for instance, *Reinsurance Australia Corp Ltd v HIH Casualty and General Insurance Ltd* [2003] FCA 56, discussed in Nygh's *Conflict of Laws in Australia* (n 10) [8.35]–[8.36], 202.

proceedings based on a comparison between the advantages of entertaining the dispute in England or remitting it to the more appropriate foreign forum.<sup>99</sup> The Joint Justices, however, did not favour this approach, observing that the more-appropriate-forum test ‘necessarily involves assumptions or findings about the comparative claims of the competing foreign tribunal, including the standards and impartiality of its members’.<sup>100</sup> Instead, they preferred a doctrinal formulation which would enable the Australian court to apply its discretion based on *its* appropriateness (or otherwise), rather than that of a foreign forum.<sup>101</sup>

*Prima facie*, the rejection of *Spiliada*, and articulation of the clearly-inappropriate-forum test, point to differences in methodological frameworks within which the *forum (non) conveniens* doctrine is applied in England and Australia. For instance, in an article in the *Melbourne University Law Review*, which was consistent with the wider conception of the decision in *Voth*, Professor Garnett observed that the clearly-inappropriate-forum test ‘focuses only upon the suitability of the local jurisdiction’<sup>102</sup> and, hence, ‘is unlikely to yield the same results as [the *Spiliada* test] which takes into account, on a relatively equal basis, the claims of both jurisdictions’.<sup>103</sup> Similarly, more recently, Professor Briggs has stated that ‘the Australian courts appear to be of the opinion that it is not appropriate for an Australian court to undertake a comparative evaluation of two courts’.<sup>104</sup>

It is, therefore, important to consider whether there is, indeed, a difference in the broader methodology which English and Australian judges employ when applying the *forum (non) conveniens* doctrine. The persuasiveness of the prevailing conception of the *Voth* test, as a more restrictive and inward-looking doctrine than its English counterpart, depends on the answer to this question.

The wider methodological setting within which the *Spiliada* analysis is conducted is, of course, comparative in nature.<sup>105</sup> In a *forum (non) conveniens* case, the English court is essentially asked to rule on whether it (or another available foreign forum) is more suitable to entertain the parties’ dispute. In arriving at its ruling, the English court is reliant on the parties’ submissions. On the one hand, the defendant would seek to convince the English court of the appropriateness of the available foreign forum. On the other hand, the claimant would argue that England is better placed to determine the dispute. In *forum conveniens* cases, the English court is effectively asked to rule on whether it is a clearly (in)appropriate forum for hearing the dispute.<sup>106</sup> In *forum non conveniens* cases, the English court is, on the face of things, preoccupied with the assessment of the alternative foreign forum’s appropriateness. However, that exercise is conducted relative to the English court’s *own* appropriateness. In this respect, therefore, the English court is inescapably engaged in evaluating its suitability *and* that of the available foreign forum. Thus, in *The Lakhta*, for instance, Sheen J’s conclusion that Russia was more closely connected to the dispute than England is another way of saying that England was not the claim’s centre of gravity and, as such, was unsuitable to entertain it.<sup>107</sup>

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<sup>99</sup> *Voth* (n 1) 558.

<sup>100</sup> *Ibid* 559.

<sup>101</sup> *Ibid*.

<sup>102</sup> Garnett (n 10) 30, 34 (discussing the principles emerging from the ruling in *Voth*).

<sup>103</sup> *Ibid* 36.

<sup>104</sup> Briggs (n 10) [4.415], 340-1.

<sup>105</sup> See, *inter alia*, the various key English authorities on the application of the *forum (non) conveniens* doctrine, such as *Spiliada* (n 6), *Connelly* (n 94), *Lubbe v Cape* [2000] 1 WLR 1545 and *VTB Capital* (n 83). See, also, Briggs (n 10) [4.415], 340-1.

<sup>106</sup> See, *inter alia*, cases such as *Cherney* (n 75); *OJSC* (n 75); and, *VTB Capital* (n 83).

<sup>107</sup> [1992] 2 Lloyd’s Rep 269, 272. See, also, *Cleveland Museum* (n 85) (a *lis alibi pendens* case) and *Chase v Ram Technical Services Ltd* [2000] 2 Lloyd’s Rep 418.

As discussed earlier, ostensibly, the Australian court has always insisted that, under the *Voth* test, its sole concern is to evaluate *its* suitability in asserting jurisdiction over an international private law dispute.<sup>108</sup> Nevertheless, in practice, the Australian court's analysis of its appropriateness is not carried out in a vacuum. For instance, in *James Harding and Coy Pty v Grigor*, Spigelman CJ observed, tellingly, that it was going 'too far' to say that, under the *Voth* test, 'in determining inappropriateness of the local forum no process of comparison with the foreign forum should be made'.<sup>109</sup> Moreover, in the context of *lis alibi pendens* cases such as *Henry v Henry* and *CSR Ltd v Cigna Insurance Ltd*, it has been stated that the Australian court's assessment of whether it is clearly appropriate is premised on a comparison between the local and foreign forums.<sup>110</sup> Accordingly, the considerations of the (dis)advantages of the alternative *foreign* forum are inevitably influential in informing the court's decision on its *own* suitability.

The analysis of the Australian *forum (non) conveniens* cases supports the argument that, despite pronouncements to the contrary, there are evident comparative elements in the court's methodology for applying the doctrine. In the *Voth* case itself, for instance, it was not until it had entertained and analysed the parties' competing submissions on the respective (dis)advantages of litigation in Australia and Missouri<sup>111</sup> that the High Court ruled that the Australian court was clearly inappropriate.<sup>112</sup> In *Toop v Mobil Oil New Guinea*, the Australian court decided to sustain its proceedings after examining the litigants' competing accounts of the (in)appropriateness of Australia and Papua New Guinea.<sup>113</sup> Likewise, in *Garsec v His Majesty The Sultan of Brunei*, McDougall J devoted a sizable part of his judgment to comparing the (dis)advantages of having the trial in Australia or Brunei, before ordering a stay of the Australian proceedings that had been issued on a foreign-based defendant.<sup>114</sup>

It is, therefore, difficult to be persuaded that the framework within which the Australian *forum (non) conveniens* doctrine is applied is not comparative in nature. This conclusion is consistent with Professor Keyes's assessment of the High Court's approach to the application of the *forum (non) conveniens* doctrine in cases such as *Oceanic Sun Line*, *Voth* and *Zhang*.<sup>115</sup> As noted by Professor Keyes, when faced with a *forum (non) conveniens* application, lower courts in Australia embark on 'a comparative balancing exercise in which the connections to the local and foreign forums are listed'.<sup>116</sup> Consequently, the inescapable conclusion must be that, in essence, the same methodological approach underpins the application of the *forum (non) conveniens* doctrine in Australia and England.

### C. The Implications of Applying the *Voth* Test

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<sup>108</sup> See, for instance, Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ in *Zhang* (n 58) 520-1.

<sup>109</sup> [1998] 45 NSWLR 20, 33-4.

<sup>110</sup> Keyes (n 73) 118.

<sup>111</sup> *Voth* (n 1) 540-2 and 542-3, stating that the dispute should be remitted to Missouri and kept in New South Wales, respectively.

<sup>112</sup> *Voth* (n 1) 570-2.

<sup>113</sup> [1999] VSC 11, [27]-[29].

<sup>114</sup> [2007] NSWSC 882, [112]-[124]. Subsequently, the New South Wales Court of Appeal upheld McDougall J's judgment: [2008] NSWCA 211. See, also, *McGregor v Potts* [2005] 68 NSWLR 109, [52]-[83], which evidenced detailed comparison of the (dis)advantages of trial in Australia and England in the context of a service-out case; and, *CMA CGM SA v Chou Shan*, where, before choosing to give up its jurisdiction, the Australian court received competing arguments about the (un)suitability of Australia and China to entertain the dispute: [2014] FCA 74, [115]-[123] (the decision was upheld on appeal: [2014] FCAFC 90).

<sup>115</sup> Keyes (n 73) 138.

<sup>116</sup> *Ibid* 140.

The foregoing discussion has sought to show that there is no clear blue water separating the specific factors based on which the English and Australian courts carry out their analysis of the *forum (non) conveniens* doctrine. This state of affairs has meant that, all else being equal, the English and Australian courts have tended to uphold (or give up) their jurisdiction in similar situations. Furthermore, the broader methodological frameworks within which the court exercises its discretion are hardly distinguishable. They both have comparative elements: under *Spiliada*, the English court assesses the appropriateness of the available foreign forum to hear the case relative to its own suitability; under *Voth*, the Australian court evaluates its own suitability in comparison to that of another available foreign forum. In these circumstances, it is difficult to accept that the apparent difference in the way the two tests have been articulated – with Australian doctrine focusing on the *local* court's (un)suitability and its English counterpart examining the (in)appropriateness of the *foreign* court – is anything other than linguistic. As such, it is argued that the prevailing view within the literature, stating that the *Spiliada* and *Voth* are tests substantively different, is unpersuasive.

An assessment of the implications of applying the *forum (non) conveniens* doctrine in Australia further supports this argument as it signifies that the application of the *Voth* and *Spiliada* tests tends to give rise to broadly similar shortcomings. In particular, not unlike the *Spiliada* doctrine, the *Voth* test has been criticised for its tendency to lead to drawn-out and expensive litigation.

If, as it has been widely claimed in the literature, the Australian court's discretion under the *Voth* test had been more limited in scope than its English counterpart under *Spiliada*, then it would have been reasonable to expect that there would be quicker and more resource-efficient resolutions to Australian *forum (non) conveniens* disputes. Indeed, when reinforcing the clearly-inappropriate-forum test, the Joint Justices had predicted that, typically, the first-instance judge would apply the *Voth* test swiftly, following the counsel's 'short, written (preferably agreed) summary identification of relevant connecting factors and by oral submissions measured in minutes rather than hours'.<sup>117</sup>

In practice, though, what was foreshadowed by the Joint Justices has not materialised. For example, in *Colosseum Investment Holdings Pty Ltd v Vanguard Logistics Services Pty Ltd*, commenting on the Joint Justices' prediction in *Voth*, Palmer J stated that,

a first instance judge should be permitted a wry smile at the advice given by the High Court as to the permissible extent and content of a judgment in 'an ordinary case': in the present judicial climate, a judge following that advice would receive a frosty welcome in the Court of Appeal.<sup>118</sup>

Likewise, in *Suzlon Energy Ltd v Bangad (No 3)*, Rares J outlined the following telling observation on the extent of resources expended in the course of a *forum (non) conveniens* case where he stated that

These applications have involved one day's hearing on preliminary issues culminating in my judgment and orders of 7 October 2011, two days of hearing, about 100 pages of submissions and over 2,000 pages of evidence about which I must now decide.<sup>119</sup>

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<sup>117</sup> *Voth* (n 1) 565. In his concurring speech in *Spiliada*, Lord Templeman had made a very similar observation: (n 6) 465.

<sup>118</sup> [2005] NSWSC 803, [72]. See, also, Giles J's comments in *News Corporation Ltd v Lenfest Communications Inc* (1996) 40 NSWLR 250, [72], as cited in *Nygh's Conflict of Laws in Australia* (n 10) 197 (fn 89).

<sup>119</sup> [2012] FCA 123, [51] (citation omitted).



These are far from isolated examples of drawn-out and resource-inefficient *forum (non) conveniens* litigation in Australia.<sup>120</sup> Strikingly, Judges and commentators in England have pointed to identical problems with respect to the operation of the *Spiliada* doctrine.<sup>121</sup> It is, therefore, argued that, if *Voth* had in fact had a narrower doctrinal scope than its equivalent test in England, these problems with its application would not have arisen to the same extent (or at all).

## V. CONCLUSION

In *Voth*, almost immediately after endorsing the clearly-inappropriate-forum test, the Joint Justices emphasised that the difference between it and the *Spiliada* doctrine would manifest itself in those instances where ‘it is held that an available foreign tribunal is the natural or more appropriate forum but in which it cannot be said that the local tribunal is a clearly inappropriate one’.<sup>122</sup> Since then, a literal reading of this passage, by Judges and commentators (in Australia and other common law jurisdictions), has come to define the Australian *forum (non) conveniens* doctrine as being *substantively* different from its English counterpart. However, this prevailing conception is not only open to question, but also, on closer inspection, ultimately unpersuasive.

As the analysis in this article has sought to demonstrate, the application of the *Voth* test has not led to the emergence of a body of precedent which signifies divergences of substance in the English and Australian courts’ application of the *forum (non) conveniens* doctrine. Both courts consider and analyse the same factors, ascribing to them the same weight, when deciding whether to stay (or sustain) their proceedings. What is more, they perform this analysis within comparative methodological frameworks that are virtually indistinguishable. The lack of substantive difference between *Voth* and *Spiliada* is further supported by the fact that their application exposes almost identical shortcomings in the two doctrines.

In sum, judges and commentators have been too quick to adopt a literal reading of the judgment in *Voth*. The examination of the case law has indicated that there may well be *rhetorical* differences in the assessment of the appropriateness of the local forum under *Voth*, on the one hand, and the foreign forum under *Spiliada*, on the other. Nevertheless, the two doctrines are not rendered *functionally* different; essentially, they are two sides of the same coin.

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<sup>120</sup> See, also, decisions in *Whung v Whung* (2011) 45 Fam LR 269, *Teleso Investments Ltd v USB AG* (2012) 262 FLR 119 and *Chen v Tan* [2012] FamCA 225 which further highlight the extent to which *forum (non) conveniens* litigation in Australia is drawn out: all noted in *Nygh’s Conflict of Laws in Australia* (n 10) p 197 (fn 93).

<sup>121</sup> See, for instance, Lord Collins of Mapesbury’s observations in *Altimo Holdings* (n 75) 1808 and Lord Neuberger of Abbotsbury PSC’s remarks in *VTB Capital* (n 83) 375-7. See, also, J Hill, ‘Jurisdiction in Civil and Commercial Matters: Is There a Third Way?’ [2001] CLP 439, 449-50 and Arzandeh (n 75) 89, 96-7.

<sup>122</sup> *Voth* (n 1) 558.